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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ALBERT GARCIA, Defendant and Appellant.	E064957 (Super.Ct.No. SWF1203375) OPINION

APPEAL from the Superior Court of Riverside County. Stephen J. Gallon, Judge. Affirmed.

Jamie Popper, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

After hours of drinking alcohol together, defendant Anthony Albert Garcia beat to death the victim, Steven Markley, using his fists and a baseball bat. Defendant admitted his conduct during a series of police interviews conducted while he was hospitalized, while still intoxicated and being treated with morphine and other drugs. All of defendant's arguments on appeal involve the evidence about defendant being affected by alcohol and drugs when he was interviewed.

A jury convicted defendant of the lesser included offense of second degree murder. (§ 187, subd. (a).)[1] The trial court sentenced defendant to a prison term of 15 years to life.

Defendant raises numerous issues on appeal. He asserts the jury's consideration of his intoxication was improperly limited to the issue of whether he formed the requisite premeditated and deliberate intent to kill and not to other defenses. Defendant contends that the statements he made to the police while hospitalized were involuntary and not a result of a knowing and intelligent waiver because of the combination of intoxication, alcohol withdrawal, a head injury, and medication. Finally, defendant urges that cumulative trial errors warrant reversal. We reject these contentions and affirm the judgment.

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[1] All statutory references are to the Penal Code unless stated otherwise.

II

FACTUAL AND PROCEDRUAL BACKGROUND

Prosecution Evidence

Defendant and Summer Stevens were alcoholics who lived together in a squalid abandoned house.

Stevens testified under a grant of immunity.[2] Her testimony seemed reluctant and was often inconsistent with other statements she had given. Nevertheless, we summarize her testimony favorably to the judgment.

Markley, the victim, was a friend who occasionally visited defendant and Stevens. On September 17, 2012, defendant invited Markley to come drink with them, and Markley spent the night. The next day, September 18, defendant, Stevens, and Markley drank beer and vodka continuously. They were joined by Matthew W., a local teenager, who was not drinking, but who irritated Markley with his attitude.

When Markley called Matthew a "punk kid," Stevens took Matthew outside and warned him to stop and Matthew explained his brother had assaulted Markley and was in jail.[3] Stevens thought Matthew would behave himself when he returned inside. However, when Markley repeatedly used derogatory language about Stevens, slandering and degrading her for about 20 minutes, defendant and Matthew became upset and told

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[2] In exchange for her testimony, she received time served for a lesser conviction; she would no longer face a murder charge.

[3] Matthew's brother and another man had beaten up Markley previously and pleaded guilty to a violation of section 245.

Markley not to talk like that to Stevens. Markley persisted and an argument ensued. Defendant told Markley to leave the house but Markley refused. Stevens testified that, while Markley was sitting on a couch, defendant hit him first and they began swinging at each other.

At some point, defendant was hit in the back of the head. Stevens testified inconsistently about defendant's head injury. She told police she saw Markley hit defendant with a hatchet. She told the district attorney she saw Markley hit defendant with an ax. But at trial she testified differently, stating that she did not see how defendant received the head injury. Although Stevens never saw Markley with a weapon, she guessed he hit defendant with the hatchet they kept under the couch. She speculated about what happened because she thought it was true and she did not want defendant to get in trouble.

Stevens also testified that, while defendant punched Markley, Matthew grabbed the bat and said, "Let's get this motherfucker," and hit Markley on the head and face. Stevens insisted to the police that defendant only hit Markley with his fists. She described it as a "quick little fight." In her 2014 interview with the district attorney, Stevens said defendant swung the bat at Markley at one point. Then, at trial, she testified that defendant grabbed the bat from Matthew and hit Markley a few times. Together defendant and Matthew hit Markley 10 or 15 times. At trial, she testified both Matthew and defendant said Markley deserved a beating for being a snitch.

When Stevens checked for a pulse, she thought Markley was dead and they should leave. In her original interview with police, she claimed that Markley was already dead

when she and defendant returned from the liquor store and that she tried to resuscitate Markley. According to Stevens, defendant was incoherent immediately after the fight. He could not walk or hold a conversation.

When Deputy Campos arrived at the scene, the bloodied victim was on the floor, his shorts unbuttoned and pulled partly down, and the pocket linings turned out. Stevens showed signs of being under the influence of alcohol and was clearly upset. She told Campos defendant was defending himself. Her story had many discrepancies. At trial, Stevens admitted lying to the police about not being present when Markley was killed.

Detective Vargas helped process the scene and concluded that Markley had been sitting on the couch because most of the blood spatter was on the couch, rather than the floor. A hatchet at the scene did not have visible blood. A bloodied aluminum bat was found outside.

According to the hospital records, defendant was treated for an injury from someone hitting the back of his head. At 7:10 p.m. on September 18, defendant's blood alcohol level was .45. Nurses gave defendant morphine five times within a 24-hour period on September 19 and 20. Nurses also gave defendant Lorazepam, a sedative, four times.

Vargas interviewed defendant at around 12:30 a.m. on September 19. Defendant first told Vargas that Markley had gotten drunk and tried to rape Stevens. Then Markley used obscenities to disparage Stevens. To protect his family and because Markley would not leave, defendant hit Markley with his fists for about half an hour. Defendant stopped fighting after he felt Markley strike him with an object.

At 2:52 a.m., Detectives Campos and Peters interviewed defendant, who was still under the influence of alcohol and morphine. Defendant said he fought with Markley because he was being provocative. Defendant said he first attacked Markley on the couch, kicking and kneeing him. Then, using his hands not a bat, he hit him 40 times in 10 minutes. After defendant knocked Markley out, Markley got back up and cracked defendant on the back of the head with an object. The head wound disoriented defendant. Matthew then hit Markley with a baseball bat.

When Campos and Peters interviewed defendant again on September 20 at 9:54 a.m., they told him they had new evidence. Defendant explained the fight variously: Markley had whipped defendant's face and scratched or hit Matthew. Although it was a "bonus" that Markley was a snitch, defendant did not beat him up for that reason. Instead, they were having a good time. Although defendant never told Matthew to hit Markley, he gave him the bat and said to do what he needed to do. After repeated questioning, defendant also conceded he talked to Stevens about beating up Markley. Defendant only wanted to fight Markley, not hurt or kill him. Defendant thought Markley probably hit him with a glass item.

Finally, defendant admitted he hit Markley with a bat one time because he was scared Markley had the upper hand and was bigger than him. Campos ended the fourth interview shortly after defendant said he had used the bat and Matthew then hit Markley about 20 times.

The autopsy showed injuries from repeated blows and that the cause of death was homicide by blunt force head and neck injuries. Markley's DNA was on defendant's shorts, on the bat, and on Matthew's jeans.

The forensic toxicologist testified that an alcoholic with a 0.45 blood alcohol level could make decisions. However, even for an alcoholic, alcohol affects cognitive functions beginning at 0.08. The higher the alcohol level, the greater the impairment.

Defense Evidence

The ER doctor who treated defendant testified his head injury could have been caused by a blunt instrument. Striking a person's head may cause a concussion, which is a temporary disruption of neurological function, and may cause confusion and affect global thinking, memory, and physiological functions. Confusion can also be a symptom of alcohol withdrawal. Lorazepam is a sedative that may either cause or reduce confusion. A 0.45 blood alcohol level, alcohol withdrawal, and morphine consumption each could cause confusion or an inability to answer questions consistently. These factors would have a greater impact on more difficult questions rather than simple questions like a person's name. Testing cannot necessarily determine whether an individual is suffering confusion in performing high-level functions.

III

THE VOLUNTARY INTOXICATION INSTRUCTION

The trial court instructed the jury, based on CALCRIM No. 625, it could consider voluntary intoxication for "no other purpose" than intent to kill and premeditation. Defendant argues voluntary intoxication was relevant in assessing other aspects of the

evidence: the truth of defendant's pretrial statements and consciousness of guilt; the element of specific intent for aiding and abetting; defendant's subjective belief of imminent harm for self-defense; and actual provocation for the defense of heat of passion.

The People respond that defendant forfeited these arguments by not requesting the appropriate pinpoint instructions. Furthermore, the trial court properly instructed the jury with CALCRIM No. 625, which correctly states the law. Even if the trial court should have instructed the jury as to any of the points defendant now raises, he was not prejudiced and any error was harmless.

The trial court instructed jurors here on consciousness of guilt due to false statements, aiding and abetting, heat of passion, self-defense, and imperfect self-defense. It also instructed pursuant to CALCRIM No. 625:

"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose."

Defendant objects to the effect of the latter instruction on jury deliberations, arguing that the jurors may have understood it to mean they could not consider the effect

of medications administered to defendant, as well as his consumption of copious amounts of alcohol and subsequent withdrawal symptoms. He argues the instructions precluded considering intoxication on multiple issues. Defendant also argues he received ineffective assistance of counsel to the extent his trial counsel failed to object to, or request modification of, CALCRIM No. 625.

Forfeiture

At the outset, we agree with respondent's contention that defendant has forfeited his instructional arguments because he did not request a modification of CALCRIM No. 625 or that any additional instructions be given on voluntary intoxication. Section 29.4, subdivision (b) provides that, when a defendant is charged with murder, evidence of voluntary intoxication is limited to the issue of whether there was premeditation, deliberation, or express malice. The trial court gave CALCRIM No. 625, the standard instruction, which is a correct statement of the law. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1381.)

Defendant may not complain on appeal that an instruction, correct in law and responsive to the evidence, was too general or incomplete when defendant has not requested appropriate clarifying or amplifying language. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 50; *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) If voluntary intoxication is an issue, defendant must seek a pinpoint instruction. (*People v. Rundle* (2008) 43 Cal.4th 76, 145.) Defendant's claim that the instruction was misleading or incorrect is forfeited on appeal. Furthermore, because defendant's substantial rights are not affected by a correct statement of the law, no exception applies. (*People v. Fitzpatrick* (1992) 2

Cal.App.4th 1285, 1291.) In light of defendant's forfeiture, the issue is not viable on appeal. Even so, as discussed below, we reject defendant's contentions on the merits.[4]

Additionally, there is no need to decide whether it was error for the trial court not to give a clarifying instruction. We evaluate under the *Watson* standard of prejudice any erroneous failure of a trial court to provide clarifying or amplifying instructions. (Cf. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132; *People v. Andrews* (1989) 49 Cal.3d 200, 215; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1054-1055.) Here, there was overwhelming evidence of defendant's guilt. There is no reasonable probability the jury would have reached a different outcome had the court instructed on intoxication as urged by appellant. The alleged instructional error was harmless under any conceivable standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Defendant's Pretrial Statements and Consciousness of Guilt

Defendant urges CALCRIM No. 625 misled the jury into believing it could not consider his intoxication as relevant to the reliability of his statements to police and his consciousness of guilt in making false or misleading statements. In support of his argument, defendant relies on *People v. Wiidanen* (2011) 201 Cal.App.4th 526 where the trial court erred when it provided a consciousness-of-guilt instruction under CALCRIM

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[4] Assuming defendant did not waive the issue, we note as to the merits that in *People v. Soto* (2016) 248 Cal.App.4th 884, review granted October 12, 2016, S236164, the Sixth District "h[e]ld the trial court erred by precluding the jury from considering evidence of defendant's voluntary intoxication with respect to his claim of imperfect self-defense." (*Id.* at p. 888.) The Supreme Court granted review in *Soto.* The issue of whether the trial court in *Soto* committed prejudicial instructional error is pending.

No. 362, while also providing CALCRIM No. 3426, an unmodified version of the voluntary intoxication instruction applicable in nonhomicide cases. The *Wiidanen* court reasoned that the defendant's intoxication was relevant on the issue of defendant's cognition. (*Id.* at p. 533.) Therefore, the jury should have been allowed to consider whether he was intoxicated when he made allegedly false statements to police and whether his intoxication prevented him from knowing those statements were false, because, "[i]f the jury so believed, those statements would not have been probative of defendant's consciousness of guilt." (*Ibid.*)

The holding in *Wiidanen*, which was not a murder case, does not mean a jury is allowed to consider defendant's voluntary intoxication for any purposes other than those specified in section 29.4. Even if *Wiidanen* applied here, the inference that defendant was aware of his guilt when he made the false statements to the investigating officers at the hospital was entirely reasonable in light of the evidence showing that defendant was capable of understanding and participating in the police interviews.

At 7:10 p.m., the evening of the murder, defendant's blood alcohol was at least .45. By 11:00 p.m. that night, defendant's speech was clear, he appeared alert and oriented, and was able to follow simple commands from the nursing staff and communicate with them. A toxicologist informed the jury that a .45 blood alcohol content (BAC) is considered significantly high, but not for a chronic alcoholic. An alcoholic's consumption increases his ability to tolerate the effects of alcohol so that it is possible for an alcoholic to remain aware, reflect, make decisions, recall events, and process information. Chronic alcoholic also burn off alcohols at a higher rate.

From 11:30 p.m. on September 18, and over the course of the next two days, nurses regularly administered small and frequent doses of morphine to manage defendant's pain, and, after the alcohol in his blood decreased, Lorazepam, a sedative, relieved defendant's alcohol withdrawal symptoms. The attending nurses concluded defendant was coherent and did not appear confused, allowing him to have contact with the detectives.

During his last police interview, defendant was on morphine and, at one point, he vomited. The jury heard defense evidence that a .45 BAC, alcohol withdrawals, and morphine could cause an individual to become confused or render him unable to answer questions. The detectives continued the interview because they believed the amount of morphine did not make it necessary to end the interview. Each time the detectives visited with defendant, he appeared coherent and understood the nature of the contact.

The evidence reasonably demonstrates that defendant's voluntary intoxication did not affect whether he knowingly made false or misleading statements to police. Accordingly, the failure to modify the challenged consciousness-of-guilt instruction is not cause for reversal. It is simply not reasonably probable defendant would have obtained a more favorable result, had the jury been instructed to consider his intoxication in determining whether he knew his statements to the police were false at the time he made them. (*People v. Wiidanen, supra,* 201 Cal.App.4th at p. 534.) Absent prejudice, trial counsel's failure to request a pinpoint instruction on this issue did not rise to the level of ineffective assistance. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 216-217.)

Aiding-and-Abetting Theory of Guilt

Defendant next argues the jury was not allowed to consider the effect his intoxication had on the required specific intent for aiding and abetting. At trial, the prosecutor argued that defendant was the direct perpetrator in Markley's death. However, to the extent the evidence showed that defendant and Matthew acted together while beating Markley to death, the evidence also supported defendant's guilt under an aiding-and-abetting theory of liability.

CALCRIM No. 404 applies to voluntary intoxication of an aider and abettor. Defendant concedes that he failed to request a pinpoint instruction on how voluntary intoxication relates to aiding-and-abetting liability and that the trial court did not have a sua sponte duty to so instruct, but he nevertheless asserts his argument is not forfeited because CALCRIM No. 625 is flawed or misstates the law. As already discussed above, CALCRIM No. 625 is correct and defendant should have requested appropriate clarifying or amplifying language. His failure to do so waives his claim on appeal. (*People v. Rundle, supra*, 43 Cal.4th at p. 145.) In any event, any error in not providing CALCRIM No. 404 was harmless because the evidence showed that defendant intended to aid and abet Matthew in assaulting Markley.

Even so, if the trial court erred by not instructing the jury with CALCRIM No. 404, it was harmless. In *People v. Mendoza* (1998) 18 Cal.4th 1114, the California Supreme Court reviewed an error which precluded the jury from considering intoxication evidence in deciding aiding-and-abetting liability, and assessed prejudice under *Watson*. (*Id.* at pp. 1134-1135.) Applying that standard for error here, it is not reasonably

probable that defendant would have obtained a more favorable result, had the trial court instructed the jury with CALCRIM No. 404.

First, the prosecution's main theory of guilt was that defendant was the direct perpetrator of murder. Second, even though the defense suggested that defendant's intoxication prevented him from aiding and abetting Matthew, the evidence reasonably supported an inference that defendant acted with both knowledge and intent during the attack on Markley. Consequently, even if the verdict was based on a theory of aiding and abetting, defendant clearly instigated the crime, beat Markley with his fists, gave Matthew the murder weapon, and took turns beating Markley with it. The jury must have found defendant acted with the requisite specific intent. Consequently, any error relating to defendant's liability as an aider and abettor was harmless. For these same reasons, trial counsel's failure to request CALCRIM No. 404 was not prejudicial. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 216-217.)

Provocation and Self-defense

We also reject defendant's claim that the trial court erred by not instructing the jury to consider voluntary intoxication on the issues of provocation and self-defense. CALCRIM No. 625, which is based on section 29.4, subdivision (b), clearly states voluntary intoxication evidence is "admissible solely" on whether the defendant "actually formed a required specific intent." Where, as here, murder is charged, the section limits the jury's consideration of voluntary intoxication evidence to "whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b).)

Section 29.4 (former section 22), was enacted in direct response to the California Supreme Court's decision in *People v. Whitfield* (1994) 7 Cal.4th 437. There, the court held that voluntary intoxication was admissible to mitigate implied malice murder, which it concluded was a specific intent crime. (*Id.* at pp. 446-450.) In 1995, the Legislature amended former section 22, now section 29.4, to permit evidence of voluntary intoxication only as to "express malice aforethought" in murder cases. (See § 29.4, subd. (b).) The 1995 amendment to former section 22 was specifically intended to overrule *Whitfield*. (See *People v. Mendoza, supra,* 18 Cal.4th at p. 1133.) The use of the phrase "harbored express malice aforethought" in section 29.4 is most reasonably understood as meaning "formed the specific intent to kill required for express malice." A defendant, charged with express malice murder, whose beliefs, whether reasonable or unreasonable, cause him to act in the heat of passion or in self-defense, has contemporaneously formed the requisite specific intent to kill. (*People v. Bryant* (2013) 56 Cal.4th 959, 968-969.) Because the formation of "an actual intent to kill" is all that matters under section 29.4, defendant's argument is wrong that the jury should have been instructed to consider voluntary intoxication in connection with justification and mitigation of that intent. The language of CALCRIM No. 625 properly instructs the jury to consider voluntary intoxication evidence "only in deciding whether the defendant acted with an intent to kill."

Defendant is also wrong about the instruction on provocation and perfect self-defense, which both embrace a reasonable person standard. The heat of passion that mitigates murder to voluntary manslaughter has both subjective and objective

components. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.) "The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively." (*Id.* at p. 1252.) The facts and circumstances must be sufficient to arouse the passions of an ordinarily reasonable person. (*Id.* at p. 1253.) Voluntary intoxication has no bearing on the objective element—whether "'an average, sober person would be so inflamed that he or she would lose reason and judgment.'" (*People v. Manriquez* (2005) 37 Cal.4th 547, 586; *People v. Rangel* (2016) 62 Cal.4th 1192, 1226.) The jury was required to conclude Markley's behavior would have inflamed the passions of a reasonable person. (See CALCRIM No. 570.) "The law does not . . . permit defendant to use himself as the measure of what is adequate provocation to reduce what would otherwise be murder to manslaughter." (*Steele*, at p. 1255.) Accordingly, defendant's voluntary intoxication was irrelevant to any provocation theory.

Given this limitation, the trial court would have properly rejected an instruction which, instead of focusing on Markley's conduct, drew the jury's attention to defendant's intoxication and his own mental state. Additionally, Markley's only conduct that might objectively be considered provocative was the evidence that Markley may have called Stevens offensive names. However, such provocation caused by name-calling would not justify beating Markley to death. It was reasonable not to request a pinpoint intoxication instruction in light of the fact that the trial court would certainly have denied it. Further, the weakness of the evidence of legally adequate provocation demonstrates any error in failing to instruct the jury was not prejudicial.

Regarding justifiable homicide, the reasonable person standard governs the right to use self-defense in this context. (See CALCRIM No. 505.) As with a claim of provocation to reduce murder to manslaughter, defendant's voluntary intoxication was irrelevant to any claim of perfect self-defense. A defendant's state of intoxication is not a factor to be considered in applying the reasonable person standard. (See *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519.) To hold otherwise would compel adoption of a reasonable intoxicated person standard. (See *People v. Enraca* (2012) 53 Cal.4th 735, 759.) Accordingly, it is not reasonably likely the jury applied the instructions in an impermissible manner when it considered whether adequate provocation existed or whether defendant was entitled to claim perfect self-defense. (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) For the same reasons, defendant fails to show there is a reasonable probability that, but for counsel's failure to request voluntary intoxication pinpoint instructions on these issues, the result of the proceeding would have been different, as required to establish ineffective assistance of counsel. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 216-217.)

Imperfect Self-Defense

On the issue of imperfect self-defense, the law allows voluntary intoxication evidence to be used by a defendant for a narrowly circumscribed set of purposes, that includes demonstrating the lack of a specific intent to kill. (§ 29.4, subd. (b).) Conversely, using voluntary intoxication evidence to support a theory that intoxication mitigated a defendant's act of murder to manslaughter by causing him to believe sincerely but unreasonably that his intent to kill was lawful is not included in section

29.4's list of permissible purposes. (See *People v. Anderson* (2002) 28 Cal.4th 767, 782.) CALCRIM No. 625 correctly reflects this distinction in the statute by focusing on "whether the defendant acted with the intent to kill."

In *Soto*, under review, the appellate court reasoned that the statute explicitly allows evidence of voluntary intoxication to be used to negate express malice, an element of murder. According to the *Soto* court, CALCRIM No. 625 is not a correct statement of the law "because the state of mind required for imperfect self-defense negates express malice, and Section 29.4 by its express terms makes voluntary intoxication admissible on the issue of express malice." (*People v. Soto, supra,* 248 Cal.App.4th at p. 898.) The court concluded that this constituted instructional error in the case before it because "when a defendant honestly believes in the need of self-defense"—as Soto claimed he did because of his voluntary intoxication—"the intent to kill is not 'unlawful' under Penal Code section 188 and, therefore, express malice is negated." (*Id.* at p. 899.) The court stated, "[b]ecause imperfect self-defense negates express malice, and because evidence of voluntary intoxication is admissible as to a finding of express malice, the trial court's instruction erroneously precluded the jury from considering voluntary intoxication in determining whether defendant acted in imperfect self-defense." (*Id.* at p. 898.) The court, nonetheless affirmed the judgment, finding the instructional error was harmless. (*Id.* at p. 907.)

We decline to follow *Soto* because it allows express malice murder defendants to use evidence of voluntary intoxication in support of imperfect self-defense as a mitigation theory to negate the unlawfulness of their intent to kill as opposed to negating the

formation of the "actual intent to kill" in the first place. Where the Legislature has spoken on the limited permissible use of voluntary intoxication evidence, such evidence in support of imperfect self-defense should be prohibited.

In sum, we reject defendant's argument that CALCRIM No. 625 was given in error because it precluded the jury from considering defendant's intoxication on the issues of provocation and self-defense. The instruction correctly states the law and even if the instruction was given in error, it was harmless. It is not reasonably probable the jury would have found defendant acted with sufficient provocation or in unreasonable self-defense to reduce express malice murder to manslaughter, or that he was justified in killing Markley under the circumstances.

IV

DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS

Defendant argues his statements to the police should have been suppressed because they were not voluntary, knowing and intelligent. However, the totality of the circumstances demonstrate that defendant spoke freely and without coercion to the police.

Hearing on the Motion to Suppress

At the hearing on the motion to suppress, defendant's nurses testified defendant's head wound was treated and he received some medication in the emergency room. When defendant was admitted to the hospital, he smelled of alcohol but he was alert, awake, and oriented, and his behavior was appropriate. Nurses administered morphine for pain and a sedative. Attending nurses assessed defendant who remained oriented, answered

questions appropriately, and did not appear confused. Defendant's nurses believed he was capable of speaking with the police.

The emergency room physician testified that defendant's head injury was potentially disorienting. There was no evidence of fracture or inter-cranial bleeding. Defendant's BAC was .45. Lorazepam is commonly used to assist patients in alcohol withdrawal. Withdrawal symptoms include anxiety, sweating and an elevated heart rate. More severe symptoms include confusion and seizure. The Lorazepam was administered to off-set the symptoms of alcohol withdrawal.

Defendant argued that the police did not initially give him *Miranda*[5] warnings and his statements in the hospital were not voluntary, knowing and intelligent because defendant was under the influence of intoxicants and suffering a head injury. Even if the trial court could find that the second, third and fourth interviews were valid, according to the defense, they were tainted by the first interview, and therefore all of defendant's statements were the subject of the suppression motion.

The People responded that defendant was not in custody at the hospital when he had his first contact with the police. Defendant initiated the discussion, saying "you want to talk for a minute, dude, I'll tell you the whole story of what happened." The investigator cautioned defendant that whatever he told the police was "voluntary" and "on [his] own." Defendant insisted he wanted the police to know the real story.

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

The prosecutor argued that a reasonable person would believe he was free to leave, and in defendant's case he believed he was under the charge of the doctor, not the police. Because defendant initiated the first discussion with the investigator, his statements were voluntary. The People also argued that defendant provided a knowing and intelligent waiver of his *Miranda* rights during the second police interview at the hospital. The evidence established defendant was alert, oriented, and thinking clearly, as well as understanding the questions asked and answering appropriately. There was no evidence that the medications administered to defendant affected his understanding adversely.

In its ruling on the motion, the trial court found defendant was not in custody during his initial contact with an investigator who had told him that he was free to leave. Even if defendant was in custody, there was no custodial interrogation associated with defendant's first statements. Defendant's waiver of *Miranda* rights was valid in the subsequent interviews. The trial court found that defendant's statements were the product of his free will, not medications or undue police coercion. Defendant volunteered his version of the story. For those reasons, the trial court held that all four statements were admissible and denied the defense suppression motion. The trial court concluded that the jury would make its own assessment of defendant's statements. We agree the motion to suppress the statements was properly denied.

Miranda

Miranda warnings are required for a custodial interrogation, in which a person has been deprived of his freedom of action in any significant way. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) A trial court examines the totality of the circumstances surrounding

the interrogation to determine whether a reasonable person in the defendant's position would have considered himself at liberty to terminate the interrogation and leave. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402; *People v. Stansbury* (1995) 9 Cal.4th 824, 830; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.) A defendant's custodial statement is involuntary if it is not "the product of a rational intellect and a free will." (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) To determine whether a defendant's statement and his waiver of rights is voluntary, a trial court examines "'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." (*Dickerson v. United States* (2000) 530 U.S. 428, 434.) "The Miranda rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions." (*Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, 2263.) We accept the trial court's factual findings, inferences, and its evaluations of credibility if supported by substantial evidence. (*People v. Box* (2000) 23 Cal.4th 1153, 1194; *People v. Whitson* (1998) 17 Cal.4th 229, 248.) We review the conclusions of law independently. (*People v. Jennings* (1988) 46 Cal.3d 963, 979; *People v. Stansbury, supra*, 9 Cal.4th at p. 831.)

The state has the burden to show the voluntariness of a confession by a preponderance of the evidence. (*People v. Haley* (2004) 34 Cal.4th 283, 298.) When evaluating voluntariness, courts apply a "totality of circumstances" test under both state and federal law, including the crucial element of police coercion; the length of the interrogation; its location; its continuity as well as the defendant's personal characteristics. (*Ibid*.) The trial court's findings as to the circumstances are upheld if

supported by substantial evidence, but the trial court's finding as to the voluntariness is subject to independent review. (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

A reasonable person would not have considered himself to be in police custody. Defendant was not in custody when Investigator Vargas first spoke with him at the hospital. Defendant was under the care of the hospital's medical staff and defendant was not under arrest or physically restrained. Investigator Vargas told defendant that he was not in custody and defendant stated that he understood and volunteered to tell his side of the story. The trial court correctly ruled that Vargas was not required to give defendant *Miranda* warnings. Defendant's subsequent *Mirandized* statements were properly admitted because all of his waivers were valid and his statements were voluntary. The trial court expressly found there was no police coercion. Its findings are supported by substantial evidence and its ruling should be upheld. (*People v. Storm* (2002) 28 Cal.4th 1007, 1028-1029, citing *Oregon v. Elstad* (1985) 470 U.S. 298.)

Defendant repeatedly claims on appeal that the evidence showed he had a head wound, was intoxicated, medicated, and going through alcohol withdrawal when he made his statements, and that there was insufficient countervailing evidence to support a finding his statements were made voluntarily under those circumstances. Defendant is wrong. As already recited at length, the evidence established he was alert, awake, and oriented to his surroundings and circumstances and did not appear confused in spite of the influence of alcohol and drugs. Throughout his hospital stay, the nurses told the police he could be interviewed. When defendant told the investigators his version of events, he answered their questions fully.

During the fourth and final interview, defendant repeated his account but admitted he believed Markley was a snitch and Matthew wanted to fight Markley. Defendant blamed Matthew for hitting him. Defendant became evasive and claimed he was drunk at the time of the attack and did not know what was true. Defendant claimed he hit Markley with the bat one time in order to get Markley off him. Then Matthew beat up Markley using the bat.

Defendant was not able to show that any of his admissions were coerced by police or involuntary based upon his condition. Additionally, defendant could not establish that his statements were tainted by any delayed *Miranda* warnings. Under the totality of the circumstances, there was no police coercion and defendant understood his rights before waiving them. We affirm the trial court's ruling. (*People v. Haley, supra*, 34 Cal.4th at p. 298; *People v. Massie, supra*, 19 Cal.4th at p. 576.)

Furthermore, any error was harmless for lack of prejudice. (*People v. Elizalde* (2015) 61 Cal.4th 523, 542; *People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Stephens's testimony, corroborated by the autopsy evidence, permitted the jury to convict defendant of second degree murder on theories of implied malice or aiding and abetting Matthew W. Any error in admitting defendant's statements could not have caused prejudice.

V

DISPOSITION

Because there is no substantial error in any respect, any claim of cumulative prejudicial error must be rejected. (*People v. Butler* (2009) 46 Cal.4th 847, 885.)

The court properly instructed the jury and denied the motion to suppress. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.